

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN DESHAWN SYKES,

Defendant-Appellant.

UNPUBLISHED

September 21, 2004

No. 245256

Wayne Circuit Court

LC No. 02-003223

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of thirty-nine to seventy years for each of the assault convictions and two to seven years for the felon in possession of a firearm conviction, and to a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from an incident on December 29, 2001, at a bar in Detroit, in which defendant allegedly shot a rifle at two Detroit police officers, wounding one of them. The defense was mistaken identity.

I. Prosecutorial Misconduct

Defendant argues that the prosecutor's conduct denied him a fair trial. Questions of misconduct by the prosecutor are decided case by case. This Court examines the pertinent portion of the record and evaluates the prosecutor's conduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). In those instances where defendant failed to object to the prosecutor's conduct at trial, this Court reviews the issue under the plain error rule. To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, and (3) the plain error affected substantial rights. The third requirement generally requires a showing of prejudice. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant first argues that the prosecutor improperly intimidated witnesses through her questioning. Defendant objected to some, but not all, of the prosecutor's conduct.

Generally, absent a proper foundation through either direct examination or proper voir dire, a prosecutor cannot create the illusion by innuendo that witnesses are being intimidated by the defense. *People v Walker*, 150 Mich App 597, 603; 389 NW2d 704 (1985). Our review of the prosecutor's questioning of Adonis Davis fails to disclose that the prosecutor violated this rule. The prosecutor's questions did not suggest improper intimidation. Rather, the prosecutor questioned the witness in an attempt to elicit information suggesting his possible bias. Evidence of a witness' bias is almost always relevant and a proper subject of examination. *People v Layler*, 464 Mich 756, 764; 631 NW2d 281 (2001). Further, the questioning was responsive to issues raised by the defense. *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001). For these reasons, this issue does not warrant reversal.

Defendant also complains that the prosecutor improperly asked Adonis Davis whether he told the police that defendant had been shot in a drug raid in 1998, and then commented on this testimony in rebuttal closing argument. Evidence that a defendant has committed another crime wholly independent of and unconnected with that for which he is on trial is generally irrelevant and inadmissible. *People v Robinson*, 386 Mich 551, 560; 194 NW2d 709 (1972). In this case, however, the prosecutor's question was relevant to Davis' credibility, given Davis' prior testimony wherein he denied giving the police information concerning defendant. Further, the question focused only on what information Davis gave to the police, not whether the information was true, thereby minimizing any prejudice. Similarly, the prosecutor merely commented on this testimony in her rebuttal argument, the comment was brief, and the comment was again made solely in the context of discussing Davis' credibility. Considered in this context, the prosecutor's conduct did not deny defendant a fair trial.

Defendant also argues that the prosecutor improperly questioned a police officer concerning the scope of the officer's investigation. We disagree. The record discloses that the prosecutor fully complied with the trial court's ruling with respect to the questioning of this witness and, therefore, did not engage in misconduct. Contrary to what defendant asserts, the officer did not testify that another witness had identified defendant as the shooter. This claim also fails because defendant fails to cite any authority in support of his claim that the challenged testimony was inadmissible. *People v Harlan*, 258 Mich App 137, 140; 669 NW2d 872 (2003).

Defendant also argues that the prosecutor improperly suggested in her rebuttal closing argument that defense counsel was intentionally misleading the jury. Because defendant did not object to the prosecutor's remarks at trial, we review this unpreserved issue for plain error. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *Watson, supra* at 592. But where the prosecutor's comments are made in response to defense counsel's argument, reversal is not required. *Id.* at 593. In this case, the challenged remarks were made during rebuttal closing argument and were responsive to defense counsel's closing arguments. Moreover, the remarks were focused on the evidence, not defense counsel's personality. Thus, viewed in context, the remarks do not warrant reversal.

II. Right of Confrontation

Defendant argues that his right of confrontation was violated because the officer in charge referred to other officers' police reports when explaining why persons were eliminated as suspects.

The principal basis for defendant's claim is that the police reports were inadmissible hearsay. We disagree. Hearsay is a statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. MRE 801(c). In this case, the reports were not offered for the truth of the matters asserted therein, i.e., the descriptions of the suspects. Rather, the officer referred to the police reports for the purpose of identifying the factual information on which the police relied in eliminating other suspects as part of their investigation. Thus, the reports were not used for an improper hearsay purpose.

Further, there is no basis for concluding that defendant's right of confrontation was violated. The right to confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness. *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994). Although defendant complains that he was not able to cross-examine the authors of the various police reports, he never sought to call those officers at trial. The Confrontation Clause does not apply where the prosecution fails to call certain witnesses that the defendant could have called to testify. *People v Cooper*, 236 Mich App 643, 659; 601 NW2d 409 (1999). Because defendant does not claim that he was prohibited from calling and confronting the authors of the various police reports, this claim fails.

III. Opinion Testimony

Defendant also maintains that testimony by the officer in charge constituted an improper opinion on defendant's guilt. See *People v Christel*, 449 Mich 578, 591; 537 NW2d 194 (1995). We disagree. Defendant advanced a defense of mistaken identity and the officer merely gave reasons for why other suspects were eliminated. Nothing in his testimony suggested that he was giving an opinion about defendant's guilt. Therefore, we reject this claim of error.

IV. Jury Instructions

Defendant did not object to the challenged jury instructions at trial. Indeed, defense counsel expressed satisfaction with the instructions given. Defense counsel's expression of satisfaction with the trial court's jury instructions waived any claim of instructional error. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). Further, even if we considered defendant's instructional issues under the plain error test applicable to unpreserved issues, *Carines*, *supra* at 763; we would conclude that reversal is not warranted.

We agree that the trial court plainly erred when it indicated that defendant had previously been convicted of felonious assault where the parties only stipulated that defendant was previously convicted of an unspecified felony. *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997); *People v Swint*, 225 Mich App 353, 377-380; 572 NW2d 666 (1997). But considering that the disclosure was inadvertent and isolated, that there was no suggestion that the nature of the prior conviction as opposed to the fact of the conviction itself made it more likely that defendant was guilty of the charged assault offenses, and the substantial evidence of defendant's guilt, we conclude that the error did not affect the outcome. Cf. *Swint*, *supra*. Therefore, this unpreserved issue does not warrant reversal.

The trial court's jury instructions did not require the jury to convict defendant of assault with intent to commit murder, to the exclusion of the lesser offense of assault with intent to do great bodily harm, in order to convict defendant of felony-firearm. On the contrary, the court expressly instructed the jury that "it is *not* necessary, however, that the defendant be convicted of that crime" (assault with intent to commit murder) in order to convict him of felony-firearm. Accordingly, there was no plain error.

Also, the court did not plainly err in referring to the crime of attempted assault. *People v Jones*, 443 Mich 88, 90, 91-99; 504 NW2d 158 (1993). Additionally, because the principal issue at trial concerned defendant's identity as the perpetrator, not whether a completed crime was committed, any error in this regard did not affect defendant's substantial rights.

V. Juror Bias

Defendant contends that reversal is required because the trial court refused to excuse a juror who expressed concern for her safety after she observed an interaction between defendant's relatives and another juror.

The trial court's decision whether to remove the juror is reviewed for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *Id.*

A defendant who chooses to be tried by a jury has a right to a fair and impartial trial. *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). When information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question, or (2) that the juror was properly excusable for cause. *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998).

In this case, the juror viewed an altercation involving defendant's relatives, but admitted that nothing was said to her and that no one attempted to touch her or threaten her. She stated that she would be able to focus on the case with an open mind and remain impartial. On this record, defendant has failed to show actual prejudice or that the juror was properly excusable for cause. The trial court did not abuse its discretion in refusing to excuse her.

VI. Scoring of the Sentencing Guidelines

The trial court's scoring of the sentencing guidelines placed defendant in prior record level "E" and offense variable (OV) level "VI," resulting in a minimum sentence range, enhanced for a second habitual offender, of 225 to 478 months or life. MCL 777.62 and MCL 777.21(3)(a). Although the trial court sentenced defendant within this range, defendant argues that the court erred in scoring OV 6 and OV 19, resulting in a sentence outside the appropriate guidelines range. Defendant objected to the scoring of OV 6, thus preserving that issue, MCL 769.34(10), but did not object to the scoring of OV 19. Therefore, our review of OV 19 is limited to plain error affecting defendant's substantial rights. *People v Kimble*, ___ Mich ___; ___ NW2d ___ (Docket No. 122271, decided 6/29/04), slip op at 8.

Although we review for clear error the trial court's factual findings at sentencing, we will uphold the trial court's scoring of the sentencing guidelines if there is any evidence in the record to support it. *People v Babcock*, 469 Mich 247, 264- 265; 666 NW2d 231 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Defendant argues that OV 6 should have been scored at twenty-five points (unpremeditated intent to kill, intent to do great bodily harm, or the creation of a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result) rather than at fifty points (premeditated intent to kill), as scored by the trial court. MCL 777.36(1)(a) and (b). Although defendant correctly observes that a sentencing judge should score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury, MCL 777.36(2)(a), the jury here was not required to determine premeditation. Thus, we reject defendant's claim that a score based on a finding of premeditation is inconsistent with the jury's verdict. Further, in light of the evidence indicating that, after the police announced their presence, defendant lifted his rifle, aimed, and fired several times, we agree that the evidence supports the trial court's conclusion that defendant acted with premeditation. Therefore, the trial court did not err in scoring fifty points for OV 6.

Although the basis for the trial court's scoring of OV 19 is not clear from the record, defendant's guidelines range is not affected by the scoring of OV 19. Because any error in scoring this variable did not affect defendant's substantial rights, this unpreserved issue does not warrant resentencing. *Kimble, supra*; *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004).

VII. Ineffective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel. We disagree.

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, he necessarily bears the burden of establishing the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant claims that counsel was ineffective because he failed to investigate and produce an alibi witness. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland, supra* at 691. A failure to call a witness who may have made a difference in the outcome of the trial can constitute ineffective assistance of counsel. *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996). In this case, the record discloses that defense counsel attempted to contact the alleged

alibi witness, who lived in West Virginia. Counsel also hired an investigator that he had used in the past who also attempted to contact the witness. According to both defense counsel and the investigator, the witness did not return their phone calls or respond to messages they left. Counsel explained that he did not subpoena the witness because the witness never contacted him and he did not want an unknown witness to come to trial and provide testimony that might backfire. On this record, we cannot conclude that counsel was deficient in his efforts to locate and call the witness.

Defendant also argues that counsel was ineffective for not attempting to suppress the identification evidence on the basis that a pretrial photographic lineup was unduly suggestive. A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *Hornsby, supra* at 466. The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *Id.* Physical differences among the lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants. *Id.* Physical differences generally relate only to the weight of an identification and not its admissibility. *Id.*

In arguing that the photographic lineup was improper, defendant relies on testimony by the lineup attorney that described defendant's photo as "looking all goofy, head cocked to the side, mouth wide open." That defendant looked this way does not support a claim that the lineup was impermissibly suggestive. Indeed, the lineup attorney testified that she reviewed the lineup to make sure that no photo stood out and she thought it was fair. There is nothing indicating that the witnesses singled out defendant because of the way he looked. Accordingly, there is no basis for concluding that defense counsel was ineffective for failing to challenge the identification evidence. Counsel is not required to make a frivolous or meritless motion. *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Finally, in light of our conclusion that defendant has failed to establish a prejudicial error with regard to the prosecutor's conduct, the trial court's jury instructions, and the scoring of the sentencing guidelines, we reject defendant's claims of ineffective assistance of counsel premised on these matters.

VIII. Cumulative Error

The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). In order to reverse on the basis of cumulative error, the effect of the errors must be seriously prejudicial in order to warrant a finding that the defendant was denied a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Only actual errors are aggregated to determine their cumulative effect. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). Having found only a single error, which we concluded was harmless, we reject defendant's claim that the cumulative effect of multiple errors requires a new trial. *LeBlanc, supra* at 591-592.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Jane E. Markey